NO. 86-1480

In the Supreme Court of the United States

OCTOBER TERM, 1986

PAUL ALEXANDER,

Petitioner

VS.

CHEVRON U.S.A. INC.

Respondent

VS.

CHAMPION OIL AND GAS LEASE SERVICE, INC.
and
NORTH RIVER INSURANCE COMPANY,

Petitioner

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION BRIEF OF RESPONDENT, CHEVRON U.S.A. INC.

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QUESTIONS RESTATED

Should this Court review the Fifth Circuit's determination, uncontradicted by any United States Circuit Court's decision or by this Court, that the long standing "borrowed employee" doctrine survived and was unaffected by the 1984 amendments to 33 U.S.C. 904(a) and 905(a) of the Longshore and Harbor Workers' Compensation Act?

On October 6, 1986, in *Capps v. N. L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986), this Court refused to grant a writ to review the Fifth Circuit's determination of this very issue.

LIST OF PARTIES PURSUANT TO RULE 28.1

1. Petitioners - Paul Alexander, Champion Oil and Gas Lease Services, Inc., and North River Insurance Company.

2. Respondent - Chevron U.S.A. Inc., parent company - Chevron Corporation; affiliated companies - AMAX, Inc., Austamax Resources Limited, Australian Consolidated Minerals N.L., Botswana RST Limited, Canada Tungsten Mining Corporation Limited, Canamax Resources, Inc., Canyon Reef Carriers, Inc., Felix Oil Company, Fresnillo Companies, Gulf Oil Finance N.V., Long Beach Oil Development Company, NOVA, an Alberta Corporation, Rosario Mexico S.A. de C.V., UNC Incorporated, Chevron Investment Management Company, Chevron Capital N.V., Chevron Capital U.S.A. Inc., Chevron Oil Finance Company.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986
NO. 86-1480

PAUL ALEXANDER,
Petitioner

VERSUS

CHEVRON U.S.A. INC.,
Respondent

CHAMPION OIL AND GAS LEASE SERVICE, INC.
and
NORTH RIVER INSURANCE COMPANY,
Petitioners

OPPOSITION BRIEF OF RESPONDENT, CHEVRON U.S.A. INC.

Respondent, Chevron U.S.A. Inc., respectfully prays that this Court decline to grant the writ of certiorari sought by petitioner to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on November 21, 1986. On October 6, 1986, in *Capps v. N. L. Baroid-NL Industries, Inc.* 784 F. 2d 615 (5th Cir. 1986), *cert. denied,* 107 S.Ct. 141, 93 L.Ed.2d 83 (1986), this Court denied a petition for a writ of certiorari to review the identical issue presented in the instant petition, as well as the Fifth Circuit's resolution of that issue. The rule of *Capps* was followed by the Fifth Circuit in the instant case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals reported at 806 F.2d 526 (5th Cir. 1986), the unpublished ruling of the district court on Chevron U.S.A. Inc.'s Motion

for Summary Judgment, as well as the district court's judgment, and supplemental order of Rule 54(b) certification of final judgment comprise the appendix to petitioner's brief.

STATUTES INVOLVED

The statutes involved are 33 U.S.C. 904(a) and 905(a), incorporated herein as Appendix A.

STATEMENT OF THE CASE

Paul Alexander, petitioner, brought this personal injury suit in the United States District Court for the Western District of Louisiana based upon the jurisdictional grant contained in the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, as well as the Federal Question Jurisdiction of this Court, 28 U.S.C. 1331. Mr. Alexander was a temporary laborer nominally employed by Champion Oil and Gas Lease Service, Inc., a business which provides laborers to oil companies in need of supplementary workers. Mr. Alexander was assigned to work for Chevron U.S.A. Inc. on its East Cameron Block 245 oil and gas production platform located on the Outer Continental Shelf, off the coast of Louisiana. He claimed that during the course of his employment with Chevron, on March 31, 1984, he suffered personal injuries, and filed the instant lawsuit to recover damages therefor. Thereafter, Champion Oil and Gas Lease Service, Inc. and North River Insurance Company intervened into the lawsuit to recover compensation benefits and medical expenses they had paid to Mr. Alexander pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*

The district court granted Chevron's Motion for Summary Judgment on the grounds that Mr. Alexander was a borrowed employee of Chevron whose exclusive

remedy as against Chevron was compensation pursuant to the Longshore and Harbor Workers' Act (LHWCA), and thus Mr. Alexander, as well as Champion and its insurer, North niver Insurance Company, were barred from any tort recovery as against Chevron. The United States Court of Appeals for the Fifth Circuit, following its settled jurisprudence, affirmed the district court's judgment.

REASONS FOR DENYING WRIT

The petition fails to state any reason for granting certiorari. Petitioners have shown no conflict among the decisions of the circuit courts, no conflict within the decisions of this Court, no important question of federal law, and certainly no unusual departure from the normal course of judicial proceedings. Sup.Ct. c . 7. Further, there is absolutely no conflict in the decisions of the Fifth Circuit regarding the continued vitality of the borrowed servant defense. See *Capps v. N. L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986); *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir. 1986); *West v. Kerr-McGee Corporation*, 765 F.2d 526 (5th Cir. 1985); and the instant case reported at 806 F.2d 526 (5th Cir. 1986).

Petitioners ask this Court to interpret 33 U.S.C. 905(a) of the LHWCA in such a fashion as to abrogate the "borrowed servant/borrowed employee" defense. Petitioners ask this Court to ignore the legislative history of 905(a) and likewise to forget the fact that this Court has recently denied a petition for writ of certiorari on the identical issue. *Capps, supra.* Petitioners' application raises no important question of federal law and is contrary to the established rules of statutory construction.

I. THE FIFTH CIRCUIT CORRECTLY FOLLOWED SETTLED JURISPRUDENCE ESTABLISHING UNEQUIVOCALLY THAT THE LONGSHORE AND HARBOR WORKERS COMPENSATION ACT AMENDMENTS OF 1984 DID NOT ABOLISH THE BORROWED SERVANT DEFENSE

The borrowed servant defense arises in cases where a defendant who is not a plaintiff's nominal employer shows that in fact the plaintiff is acting as the defendant's employee with the result that the employee's exclusive remedy against the defendant is for compensation benefits under the LHWCA 33 U.S.C. §901 *et seq.*[1] This defense, which arises from the reverse application of the doctrine of respondeat superior, has been thoroughly ingrained in the jurisprudence both prior to, and following the LHWCA 1984 Amendments. *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969); *Champagne v. Penrod Drilling Co.*, 341 F.Supp. 1282 (W.D.La. 1971), *aff'd*, 459 F.2d 1042 (5th Cir. 1972); *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. den.*, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed. 2d 414 (1978); *Hebron v. Union Oil Company of California*, 634 F.2d 245 (5th Cir. 1981). *West v. Kerr McGee Corp.*, 765 F.2d 526 (5th Cir. 1985; *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir. 1986); *Capps v. N. L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. den.*, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986).

Following the 1984 amendment to the LHWCA, Pub.L. No. 98-426, 98 Stat. 1639 (1984), 33 U.S.C. 904(a) and 905 (a) read as follows:

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[1] 33 U.S.C. 905(a) before 1984 read in pertinent part:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee.

904(a) "Every employer shall be liable for and secure the payment of compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor."

905(a) "The liability of an employer prescribed in §904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . For purposes of this subsection a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by §904 of this title."

The word employer in both 904 and 905 has been interpreted to include not only direct employers but also borrowing employers who exercise control over the actions of another's nominal employees as if they were the direct employees of the borrowing employer. Because there is in fact an employment relationship between the borrowing employer and the borrowed employee, all of the legal effects flow from the relationship, including, for example, borrowing employer liability for the torts the employee might commit within the scope of his employment. One of those legal effects is the tort immunity set forth in 33 U.S.C. 905(a). E.g., *Ruiz v. Shell Oil Company,* 413 F.2d 310 (5th Cir. 1969); *Raymond v. I/S Caribia,* 626 F.2d 203 (1st Cir. 1980); *Huff v. Marine Tank Testing Corporation,* 631 F.2d 1140 (4th Cir. 1980); *Hebron v. Union Oil Company of California,* 634 F.2d 245 (5th Cir. 1981). *West v.*

Kerr McGee Corp., 765 F.2d F.2d 526 (5th Cir. 1985); *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir. 1986); *Capps v. N. L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. den.*, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986).

The rationale for this borrowed servant doctrine is contained in the seminal case of *Standard Oil Company v. Anderson*, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909), where an injured longshoreman sought recovery in tort from a winch operator with whom his direct employer had assigned him to work.

The question presented was whether a winch operator was the borrowed servant of another thereby abrogating any tort liability in the winch operator's nominal employer for the winch operator's actions. In discussing the test of borrowed servant status and the legal effects thereof, the Supreme Court stated:

> One may be in the general service of another, and nevertheless, with respect to particular work, may be transferred with his own consent or acquiescence, to the service of a third person, *so that he becomes the servant of that person with all the legal consequences of the new relation.* 212 U.S. at 220, 29 S.Ct. at 253, 53 L.Ed. at 483. (Emphasis added.)

The borrowed servant doctrine has been ingrained in the jurisprudence of this Court. *Standard Oil, supra; Kelley v. Southern Pacific Company*, 419 U.S. 318, 95 S.Ct. 472, 42 L.Ed.2d 498 (1974); *Baker v. Texas and Pacific Railway Co.*, 359 U.S. 227, 79 S.Ct. 664 (1959). Petitioner has cited no cases which are in conflict with this jurisprudence or even discuss or question the continued vitality of the borrowed servant doctrine. Rather, he asks the Court to find that the 1984 amendments to 33 U.S.C. 904(a) and 905(a) were meant to legislatively eliminate the borrowed

employee doctrine and defense. The basis for this novel suggestion is the last sentence contained in 905(a), added by Publ L. 98-426, 98 Stat. 1639 (1984):

> For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employee only if the subcontractor fails to secure the payment of compensation as required by 904 of this title.

Petitioner argument has been squarely rejected by the Fifth Circuit below in this case and by three other panels of the Fifth Circuit in *West*, 765 F.2d 526 (5th Cir. 1985)' *Doucet*, . 3 F.2d 518 (5th Cir. 1986); and, *Capps*, 784 F.2d 615 (5th Cir. 1986), *cert. den.*, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986). This Court, by denying a petition for writ of certiorari in *Capps*, squarely refused to question the Fifth Circuit's resolution of this issue.

Petitioner's argument is not supported by the language of the amendment, which is directed solely at contractors (and not borrowing employers) and is contradicted by the legislative history of the amendment. Petitioner fails to comprehend the distinction between the tort immunity accorded "borrowing employers" and the tort immunity previously accorded contractors who subcontracted their work and thereby were statutorily bound under 33 U.S.C. 904 to guarantee the payment of compensation to employees of their subcontractors. The language of the amendment clearly addressed itself only to the latter situation.

A defendant/employer who is not the direct employer of the plaintiff can obtain immunity from tort liability under either of two separate circumstances. First, a defendant can establish that the plaintiff was in fact acting as the defendant's employee, and was thus a borrowed employee. Second, a general contractor can assert

immunity from tort suit by the employee of a subcontractor "not because the plaintiff was a "borrowing" or *de facto* employee of the general contractor, but because of the general contractor's obligation under the pre-1984 LHWCA to guarantee the payment of compensation to subcontractor's employees. See, 33 U.S.C. 904(a) (1976)." *West, supra*, 765 F.2d at 529.

In *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984); reh. den. 468 U.S. 1226, 105 S.Ct.26, 82 L.Ed. 2d 919 (1984), this Court recognized that, in the second situation only (statutory guarantor), the majority position of the federal courts was that a contractor had no immunity unless the subcontractor failed to secure compensation and the general contractor was forced to pay it. 104 S.Ct. at 2835, 81 L.Ed. 2d at 779. *WMATA* overturned that majority position, holding that general contractors were entitled to immunity from tort liability unless they failed to meet their statutory obligation under §904(a) to secure compensation when the subcontractor failed to do so. 104 S.Ct. at 2835, 81 L.Ed. 2d at 781. *WMATA* did not in anyway address or discuss the borrowed servant defense.

The amendment to §905(a) upon which petitioner relies was enacted three months following the WMATA decision. The report of the Conference Committee unambiguously declares that *WMATA*:

> "... changed key components of what had widely been regarded as the proper rules governing contractor and subcontractor liability under the [LHWCA] . . . WMATA, the conferees believe does not comport with the legislative intent of the act, nor its interpretation from 1927 through 1983. The case should not have any precedential effect." H.R. Conf. Rep. No. 98-1027, 98 Cong., 2nd Session 24, Reprinted in 1984 U.S. Code Cong. and Admin. News 2734, 2771, 2774.

The Committee Comments make no reference to the immunity accorded to employees pursuant to the borrowed employee doctrine. The express intent of the legislature was to overrule *WMATA* as an unwanted deviation from 56 years of precedent. As the Fifth Circuit recognized in *West*, the years of precedent include the borrowed employee doctrine as well as the general-contractor rule rejected by *WMATA*. The Committee Comments show that Congress intended to do no more than restore the state of the law as it existed prior to *WMATA*, including the borrowed servant doctrine.

In holding that the 1984 amendments did not abrogate the borrowed servant defense, the *West* court stated:

> *. . .The legislative history of the 1984 amendments unambiguously demonstrates that Congress's sole purpose in amending §904(a) and §905(a) was to overrule WMATA, and not to amend the borrowed-servant doctrine or otherwise modify LHWCA law.* The report of the Conference Committee that added the §904(a) and §905(a) amendments states that *WMATA* "changed key components of what had widely been regarded as the proper rules governing contractor and subcontractor liability under the [LHWCA]," and recites that the amendments "disapprove[e]" *WMATA*. After describing the amendments, the report concludes:
>
> *WMATA, the conferees believe, does not comport with the legislative intent of the Act nor its interpretation from 1927 through 1983. The case should not have any precedential effect.*
>
> *H.R.Conf.Rep. No. 98-1027, 98th Cong., 2d Sess. 24, reprinted in* 1984 U.S. Code Cong. & Admin. News 2734, 2771, 2774.

> The narrow Congressional focus on reversing *WMATA* is underscored by the Conference Committee's beginning and ending sentences. Congress characterized *WMATA* as an unwanted deviation from 56 years of precedent. That precedent includes the borrowed-employee doctrine, *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), as well as the general-contractor rule rejected by *WMATA*, *Probst v. Southern Stevedoring Co.*, 379 F.2d 763 (5th Cir. 1967). Indeed, this court has explicity recognized that *Probst*, whose rule is codified in the 1984 amendments, does not foreclose the possibility that a general contractor may be an employer under the borrowed-servant doctrine. *Champagne v. Penrod Drilling Co.*, 462 F.2d 1372 (5th Cir. 1972), *cert. denied*, 409 U.S. 1113, 93 S.Ct. 927, 34 L.Ed.2d 696 (1973). The committee language shows that Congress intended to do more than restore the understanding that existed at the time of *Ruiz*, *Probst*, and Champagne. We conclude that the 1984 amendments have no bearing on the borrowed-employee issue before us.

765 F.2d at p. 529-530. (Emphasis added.)

In *Doucet, supra*, the Fifth Circuit, once again rejected the argument that the LHWCA amendments abrogated the borrowed servant defense, holding:

> We hold that an oil company subject to the Longshoreman and Harbor Worker's Compensation Act may invoke the borrowed-employee doctrine in defense of a tort claim by a worker nominally employed by a labor-services contractor.

783 F.2d at p. 520.

The argument was again advanced that under the amended provision of 33 U.S.C. 905(a), the borrowed servant defense had been eliminated and the only way an oil company could avail itself of the tort immunity set forth in

this provision was if the oil company was actually called upon to make compensation payments to the injured employee in accordance with 33 U.S.C. 904(a). In rejecting the argument, the Court stated:

> This circuit has consistently held that, if an oil campany assumes so much control over the activities of a person who is nominally the employee of the company's subcontractor as to make that person in effect its borrowed employee, the company is shielded by the exclusivity of the compensation remedy from tort liability. *This was not based on a specific provision of the Compensation Act but stemmed from a reverse application of the respondent superior rule, the rule that an employer is responsible not only for the acts of those persons on his payroll but for the acts of those over whom he has such control that they are in effect his borrowed servants. Thus a rule designed to impose tort liability on a person in control of an employee, albeit a borrowed one, became a defense against tort liability to the controlled employee.*
>
> *The 1984 amendments did not abolish this defense by implication. . . .*

783 F.2d at 522 (emphasis added).

The argument was again rejected by the Fifth Circuit in *Capps,* 784 F2.d at p. 619, just as it was in the instant case.

The availability of the borrowed servant defense to a borrowing employer does not arise out of the fact that the borrowing employer has in fact made compensation payments to an injured worker in accordance with 33 U.S.C. 905(a). Rather, the defense arises out of the nature of the work relationship between the borrowing employer and the worker, the fact that the worker is acting as the employee of the borrowing employer, and therefore the legal effects of the employment relationship flow

therefrom. A borrowing employer is responsible to a third party for the tortious behavior of the borrowed employee. This is one of the legal effects of the relationship. The borrowing employer is burdened with this tort liability as *de jure* employer of the worker, and in return he receives the benefit of the exclusive remedy provisions of 33 U.S.C. 905. This *quid pro quo* was neither addressed in *WMATA*, nor addressed or precluded by the 1984 LHWCA amendments. The continued vitality of this defense is unquestioned.[2]

II. THE FIFTH CIRCUIT'S OPINION IS IN COMPLETE ACCORD WITH THE PRIOR DECISIONS OF THIS COURT

There is no decision of any court in conflict with the Fifth Circuit's determination in the instant case that the borrowed employee doctrine survived and was unaffected by the 1984 amendments to the LHWCA. In fact, the only four courts considering the issue concluded that this is a correct statement of the law. *West, supra, Doucet, supra, Capps, supra* and *Alexander, supra.* (see F.N. 2 above.)

The Fifth Circuit's construction of 33 U.S.C. 905(a) as amended by the 1984 amendments is in complete accord with the decisions of this Court regarding statutory interpretation. The sole purpose of the amendment of 33 U.S.C. 905(a) was to abrogate the statutory-guarantor defense of *WMATA*; it did not in anyway have as its purpose the

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[2] Parenthetically, it should be noted that appellants have cited three cases, apparently for the proposition that the 1984 amendments to the LHWCA abrogated the borrowed servant defense. *Martin v. Ingalls Shipbuilding, Division of Litton Systems, Inc.*, 746 F.2d 231 (5th Cir. 1984); *Trussell v. Litton Systems, Inc.*, 753 F.2d 366 (5th Cir. 1984); and *Weathersby v. Conoco Oil Co.*, 752 F.2d 953 (5th Cir. 1984). Not one of these cases even mentions, let alone discusses or questions the existence of borrowed servant defense. There discussions are limited to the "statutory guarantor" immunity of the *WMATA* case, and the abrogation of that immunity by the 1984 amendments.

abrogation of the borrowed servant doctrine. The legislative history of the amendments, referenced above, makes this abundantly clear. It is absolutely proper, that a Court construing a statute, review the legislative history to ascertain its meaning.

In *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976), this Court held that to the extent the court of appeals rejected reference to the Federal Water Pollution Control Act's legislative history in discerning the meaning of the statute, the court was in error, for "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." 48 L.Ed.2d at 434. Similarly, in *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 104 S.Ct. 597, 78 L.Ed.2d 420 (1984), this Court expressly recognized that when dealing with complex statutes, the true meaning of a single section of the statute, however precise its language, cannot be ascertained if considered apart from related sections or isolated from the history of the legislation of which it is an integral part.

As this Court stated in *Watt v. State of Alaska*, 451 U.S. 259, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981):

> . . . "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (POWELL, J, concurring). See Rubin v. United States*, 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981). But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1976); *United States v. American Trucking Assns., Inc.*, 310 U.S. 534,

> 543-544, 60 S.Ct. 1059, 1063-1064, 84 L.Ed. 1345 (1940). This is because the plain-meaning rule is "rather axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand Co. v. United States,* 278 U.S. 41, 48, 49 S.Ct. 52, 54, 73 L.Ed. 170 (1928) (Holmes, J.). *The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of Common meaning to have their literal effect. E.G., Church of the Holy Trinity v. United States,* 143 U.S. 457, 459, 36 L.Ed. 226 (1892); *United States v. Ryan,* 284 U.S. 167, 175, 52 S.Ct. 65, 68, 76 L.Ed. 224 (1931).

101 S.Ct. at 1677-1678 (Emphasis added.)

The legislative history shows without question that the sole purpose of the 1984 amendment to 33 U.S.C. 904(a) and 905(a) was to legislatively overrule *WMATA,* and nothing else. It did not in anyway abrogate, address or effect the borrowed servant defense. Petitioners' argument ignores this Court's decision in *WMATA, supra,* as well as the legislative history of the 1984 amendments. Petitioners' argument is frivolous and not worthy of review by this Court. Review of the identical argument was refused by this Court in *Capps v. N. L. Baroid-NL Industries, Inc.,* 784 F.2d 615 (5th Cir. 1986), *cert. den.,* 107 S.Ct. 141 (1986), 93 L.Ed.2d 83.

CONCLUSION

Petitioner seeks a writ of certiorari to review the determination by the Fifth Circuit below that the 1984 amendments to the LHWCA, particularly 33 U.S.C. 904(a) and 905(a), did not affect the continued vitality and existence of the borrowed employer defense. A cursory review of the statutes' language and legislative history confirms

that the Fifth Circuit's decision below was the correct one. Moreover, the only courts which have considered the issue have reached the identical conclusion. *West, supra, Doucet, supra, Capps, supra.* There is no conflict within the Fifth Circuit or within any circuit with respect to the issue before the Court.

Respondent respectfully urges that this Court deny the writ of certiorari requested by petitioner to review the decision of the Fifth Circuit Court of Appeals entered in this case on November 21, 1986.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that copies of the foregoing opposition have been served on:

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by United States mail, first class, postage prepaid, this 27th day of May, 1987.

George B. Jurgens III

GEORGE B. JURGENS III

APPENDIX

33 U.S.S. §904. Liability for compensation.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause of the injury.

33 U.S.C.. §905 Exclusiveness of liability.

(a) Employer liability; failure of employer to secure payment of compensation. The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury of death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the

> injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumes the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title. . .

Prior to the amendments of the LHWCA, Pub. L. No.98-426, 98 Stat. 1639, 1641 (1984), 33 U.S.C. §§904 (a) and 905(a) read:

33 U.S.C. §904. Liability for compensation.

(a) Every employer shall be liable for and secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

§905. Exclusiveness of liability.

(a) Employer liability; failure of employer to secure payment of compensation:

Employer liability; failure of employer to secure payment of compensation. The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on accout of such injury or death. In such action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumes the risk of his employment, or that the injury was due to the contributory negligence of the employee.